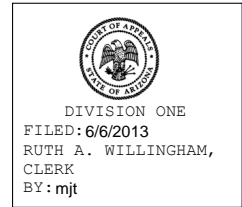


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 12-0225
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
MARCOS ALBERTO CANTU,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-103985-001

The Honorable Lisa Daniel Flores, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals
Attorneys for Appellee

Janelle A. McEachern, Attorney at Law Chandler
By Janelle A. McEachern
Attorney for Appellant

N O R R I S, Judge

¶1 Marcos Alberto Cantu timely appeals from his convictions and sentences for sexual abuse and attempted molestation of a child, both class three felonies and dangerous crimes against children. Ariz. Rev. Stat. ("A.R.S.") §§ 13-1404

(2010), -1410 (2010), -1001(C)(2) (2010). After searching the record on appeal and finding no arguable question of law that was not frivolous, Cantu's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Cantu to file a supplemental brief *in propria persona*, but Cantu did not do so. After reviewing the entire record, we find no fundamental error and, therefore, affirm Cantu's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND¹

¶12 Cantu and his niece N.P. developed a close relationship during her seventh grade. He sometimes picked her up after school and softball practices, and they talked about "sexual things" and shared each other's "secrets." Cantu also sent N.P. text messages, asking her to do her "homework" and send him pictures of her "landscape." N.P. showed those messages to her "best friend" and explained "homework" meant "fingering" herself, and "landscape" referred to her vagina. In

¹ We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Cantu. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

another text message, Cantu said he "loved [N.P.] like a daughter, but [he] was more fond of [her] than that."

¶13 In the evening of January 4, 2011, Cantu picked up N.P. from basketball tryouts and drove her to her grandparents' house. After arriving at N.P.'s grandparents' house, Cantu touched N.P.'s breast and asked her to touch his penis.

¶14 Two days after the incident, N.P. and Cantu continued to exchange text messages. In those messages, Cantu asked to "stop by for 'a squeeze,'" and told N.P. he "care[d] for [her] . . . but like[d] [her] to[o]." N.P. responded she did not "feel that way for [her] uncle," did not "enjoy what [had] happened," and Cantu had "black mailed" her. Cantu asked N.P. to "forgive" him, "promise not [to] say anything to anyone," and to "erase all messages," because "[t]his could ruin [their] lives."

¶15 Meanwhile, N.P. sent her aunt text messages regarding the incident. In one message, N.P. wrote:

I told [him] about every guy i've ever dated. He's been telling me he's fond of me & that he likes me. He's been asking me for crazy pictures. He's been asking me about my landscape and asked to see it up close. Marc squeezed [my] boob. He said it was the only thing I could do for him to not tell anyone my secrets that i trusted him with.

In response, N.P.'s aunt wrote: "he did [that] to me to[o] . . . I've kept it a secret for 13 [years]." N.P. later told a school

counselor about the incident, and eventually, other family members.

¶16 After the school counselor contacted the police, on January 20, 2011, N.P. described the incident in a forensic interview. She said Cantu threatened to tell her "secrets" to her mother if she did not let him "squeeze [her] boob," and after she told him "no" twice, Cantu "reached over" and "grabbed" her breast. According to N.P., Cantu commented her breast was "big," and then said his "penis just got hard" and asked whether she wanted to "feel it."

¶17 N.P. also participated in a confrontation call with Cantu. During the call, although Cantu characterized his conduct as "foolin' around," "flirting," a "wrestling hold," and a "pull thingy," he admitted they were "talkin[g] about inappropriate things and it just got out of hand." Cantu also repeatedly asked N.P. to "make it better" and "tell everybody it didn't happen."

¶18 A grand jury indicted Cantu for sexual abuse and attempted molestation of a child. At trial, and pursuant to Arizona Rules of Evidence 404(b) and (c), the superior court admitted evidence of other acts regarding Cantu's actions towards N.P., N.P.'s aunt, and one of his former students. Based on our review, the court properly admitted this evidence. The court also ruled Cantu's statement to N.P. that he had

sexual relationships with four former students -- a "secret" Cantu shared with N.P. -- was admissible because it was "intrinsic to the crime charged." By sharing this "secret" with N.P., Cantu was encouraging N.P. to trust him with her secrets and was engaging in critical, preliminary activity ("engagement" and "grooming"), which he used to facilitate his subsequent sexual contact with and abuse of N.P.²

¶19 Initially, N.P. failed to appear at trial. Eventually, after receiving immunity, N.P. testified and recanted her allegations against Cantu. She testified Cantu had not touched her breast, had only given her a "headlock," and she had fabricated the story because she was angry with one of his daughters. She also denied Cantu had asked her to touch his penis. N.P. agreed, however, that before the trial, she had

²At the time of Cantu's trial, the test for whether evidence was intrinsic, and thus admissible, was whether the (1) evidence of the other act and evidence of the crime charged were "inextricably intertwined"; or (2) both acts were part of a "single criminal episode"; or (3) the other acts were "necessary preliminaries" to the crime charged. *State v. Andriano*, 215 Ariz. 497, 502, ¶ 18, 161 P.3d 540, 545 (2007), *abrogated by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). After the jury convicted Cantu, the Arizona Supreme Court narrowed the definition of intrinsic evidence in *Ferrero*, 229 Ariz. at 243, ¶ 20, 274 P.3d at 513. Under *Ferrero*, intrinsic evidence is evidence that "(1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *Id.* Assuming, without deciding, *Ferrero* applies retroactively, Cantu's statement to N.P. about his "secret" was nevertheless admissible as intrinsic evidence under the more stringent *Ferrero* test because it was "performed contemporaneously with and directly facilitate[d]" Cantu's offenses.

not told anyone about the "headlock," and her family, which had been very close, had been "torn apart" because of this case.

¶10 N.P.'s mother, N.P.'s friend, and N.P.'s school counselor, on the other hand, all testified that after the incident, N.P. had told them Cantu had touched her breast. An expert witness testified children who disclose abuse feel pressured to recant when they encounter a "disclosure disaster," such as, when their "family breaks apart" because of their disclosure.

¶11 After the jury found Cantu guilty as charged, the superior court sentenced him to a term of imprisonment for 2.5 years with 30 days of presentence incarceration credit on the sexual abuse count. The court suspended imposition of sentence on the attempted child molestation count and placed Cantu on lifetime supervised probation.

DISCUSSION

¶12 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Cantu received a fair trial. He was represented by counsel at all stages of the proceedings and was present at all critical stages.

¶13 The evidence presented at trial was substantial and supports the verdicts. The jury was properly comprised of eight members and the court properly instructed the jury on the

elements of the charges, Cantu's presumption of innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Cantu was given an opportunity to speak -- and did speak -- at sentencing, and his sentences were within the range of acceptable sentences for his offenses.

CONCLUSION

¶14 We decline to order briefing and affirm Cantu's convictions and sentences.

¶15 After the filing of this decision, defense counsel's obligations pertaining to Cantu's representation in this appeal have ended. Defense counsel need do no more than inform Cantu of the outcome of this appeal and his future options, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

¶16 Cantu has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Cantu 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
ANDREW W. GOULD, Judge

/s/
RANDALL M. HOWE, Judge